

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
SCOTT FRANK and JENNIFER FRANK,

Index No.: CV 11 0250

Plaintiffs.

-against-

VERIFIED ANSWER WITH
JURY DEMAND

SEYMOUR PESTRONK

Defendant.
-----X

C O U N S E L O R S :

The defendant, **SEYMOUR PESTRONK**, by his attorneys, the LAW OFFICE OF JAMES J. TOOMEY, answering the verified complaint of the plaintiffs, allege upon information and belief, the following:

ANSWERING COUNT 1

FIRST: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs of the verified complaint designated "1", "4", "5" and "27".

SECOND: Denies each and every allegation contained in the paragraph of the verified complaint designated "6" and respectfully refers all questions of law to the court.

THIRD: Denies each and every allegation contained in the paragraphs of the verified complaint designated "7", "21", "22", "23", "24", "25", "26" and "28.

FOURTH: Denies each and every allegation contained in the paragraphs of the verified complaint designated "10", "11", "12, "13", "14" and "15" in the manner alleged and respectfully refers all questions of law to the court.

ANSWERING COUNT II

FIFTH: Responding to the paragraph of the verified complaint designated “29”, repeats and reiterates each and every admission, denial and other response heretofore made to the preceding paragraphs “1” through “28” with the same force and effect as if set forth fully at length herein.

SIXTH: Denies any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph of the verified complaint designated “30”.

SEVENTH: Denies each and every allegation contained in the paragraph of the verified complaint designated “31”.

ANSWERING THE PRAYER FOR RELIEF

EIGHTH: Denies each and every allegation contained in the Prayer for Relief designated “a”, “b”, “c”, “d”, “e”, “f”, “g”, “h” and “i” of the verified complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

That the plaintiffs’ alleged damages representing the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss were or will, with reasonable certainty, be replaced or indemnified, in whole or in part, by or from a collateral source and this Court shall, pursuant to CPLR Section 4545(c), reduce the amount of such alleged damages by the amount such damages were or will be replaced or indemnified by such collateral source.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

The injuries and damages allegedly sustained by plaintiffs were caused in whole or in part by the culpable conduct of plaintiff SCOTT FRANK, including negligence and assumption of risk, as a result of which the claim of plaintiffs are therefore barred or diminished in the

proportion that such culpable conduct of plaintiff bears to the total culpable conduct causing the alleged injuries and damages.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

Upon information and belief plaintiffs failed to mitigate damages.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' sole and exclusive remedy is confined and limited to the benefits and provisions of Article 51 of the Insurance Law of the State of New York.

Plaintiff did not sustain a serious and permanent injury as defined by Section 5102 of the Insurance Law of the State of New York, and his exclusive remedy is confined and limited to the benefits and provisions of Article 51 thereof.

Plaintiffs' cause of action is barred by Article 51, Section 5104 of the Insurance Law of the State of New York.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

That if it is determined that plaintiff failed to use available seatbelts, defendant hereby pleads such fact in mitigation of damages.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

That this action is barred by reason of the fact that plaintiff did not sustained a "serious injury" as defined in Section 5102 of the Insurance Law and, thus, has no right of recovery under Sec. 5104 of the Insurance Law.

JURY DEMAND

Defendant, SEYMOUR PESTRONK, hereby demands a jury during the trial of this action.

WHEREFORE, defendant demands judgment dismissing plaintiffs' verified complaint against him, together with the costs and disbursements of this action and for any expenses incurred by him in the defense thereof, including attorney fees.

Dated: New York, New York
March 16, 2011

Yours, etc.

LAW OFFICE OF JAMES J. TOOMEY


By: SCOTT M. KARPEL (SK-0610)

Attorneys for Defendant

SEYMOUR PESTRONK

Office & P.O. Address

485 Lexington Avenue, 7th Floor

New York, NY 10017

(917) 778-6600

Matter No.: 1052569SK

TO:

FRED R. ROSENTHAL (FRR-4528)
PARKER WAICHMAN ALONSO LLP
Attorneys for Plaintiffs
Office & P.O. Address
6 Harbor Drive
Port Washington, New York 11050
(516) 466-6500
File No.: 013870

ATTORNEY VERIFICATION

SCOTT M. KARPEL, affirms as follows:

I am an attorney at law admitted to practice in the Courts of the State of New York, and am associated with the LAW OFFICE OF JAMES J. TOOMEY, attorneys for defendant, **SEYMOUR PESTRONK** in the within action, and as such, I am fully familiar with all the facts and circumstances therein.

That the foregoing Answer to Verified Complaint is true to the knowledge of affirmant, except as to those matters therein stated to be alleged upon information and belief, and that as to those matters affirmant believes it to be true.

Affirmant further states that the reason that this verification is made by affirmant and not by defendants is that the defendant is not within the County of New York where affirmant maintains his office.

Affirmant further states that the sources of his knowledge and information are reports of investigations, conversations, writings, memoranda, and other data concerning the subject matter of the litigation.

The undersigned attorney affirms that the foregoing statements are true, under the penalties of perjury pursuant to Rule 2106 of the CPLR.

Dated: New York, New York
March 16, 2011


SCOTT M. KARPEL

STATE OF NEW YORK
COUNTY OF NEW YORK

AFFIDAVIT OF SERVICE
BY MAIL

MERRIS GORDON, being duly sworn, deposed and says that deponent is a secretary of the LAW OFFICE OF JAMES J. TOOMEY, attorneys for one of the parties herein; is over 18 years of age; is not a party to the action. The deponent served the papers noted below by regular mail, the same securely enclosed in the postage paid wrapper in the Letter Box maintained and exclusively controlled by the United States Postal Service at 485 Lexington Avenue, New York, New York 10017; directed to the said attorney(s) at the address indicated below; that being the address within the state designated by said attorney(s) for that purpose, or the place where said attorneys(s) then kept an office, between which places there then was and now is a regular communication by mail as follows:

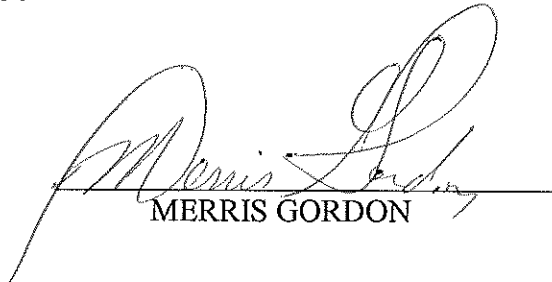
Re: Frank, Scott and Jennifer Frank v. Seymour Pestronk – Index No.: CV 11 0250

Date Mailed: March 17, 2011

Papers Served: VERIFIED ANSWER WITH JURY DEMAND

Served Upon:

FRED R. ROSENTHAL (FRR-4528)
PARKER WAICHMAN ALONSO LLP
Attorneys for Plaintiffs
Office & P.O. Address
6 Harbor Drive
Port Washington, New York 11050
(516) 466-6500
File No.: 013870



MERRIS GORDON

Sworn to before me this
17th day of March, 2011



Notary Public

SOL P. ANDO
Notary Public - State of New York
No. 244701786
Qualified in KINGS County
My Commission Expires JANUARY 31, 2014

UNITED STATES DISTRICT COURT
COUNTY OF EASTERN

Index No. :250/11

SCOTT FRANK and JENNIFER FRANK,

Plaintiffs,

-against-

SEYMOUR PESTRONK,

Defendant.

VERIFIED ANSWER WITH JURY DEMAND

Law Office of
JAMES J. TOOMEY

Attorneys for Defendant
SEYMOUR PESTRONK
Office & P.O. Address
485 Lexington Avenue, 7th Floor
New York, New York 10017

Tel. No.: (917) 778-6600

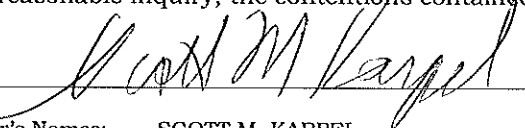
Fax No.: (917) 778-7020

(917) 778-7022

Matter No.: 1052569

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: **March 17, 2011**

Signature: 

Print Signer's Names: **SCOTT M. KARPEL**

Service of a copy of the within

is hereby admitted.

Dated:

Attorney(s) for

NOTICE OF ENTRY:

PLEASE TAKE NOTICE that the within is a true copy of an order entered in office of the Clerk of the above Court on the ____ day of _____, 200 .

NOTICE OF SETTLEMENT:

PLEASE TAKE NOTICE that the within proposed order will be presented for settlement and entry at the Courthouse on the ____ day of _____, 200 , at 10:00 a.m. at the office of the Clerk of the Part of this Court where the within described motion was heard.

Dated: New York, New York

Law Office of
JAMES J. TOOMEY
Attorneys for Defendant(s)
As Designated Above